Nos. 86-303 and 86-304

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

DONALD P. HODEL, SECRETARY OF THE INTERIOR, *et al.*,
Petitioners,

AMOCO PRODUCTION COMPANY, *et al.*,
Petitioners,

v.

TRIBAL VILLAGE OF AKUTAN, *et al.*,
Respondents.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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The Tribal Villages of Akutan, Togiak and Nelson Lagoon, the State of Alaska, Trustees for Alaska, and others respectfully request that this Court deny the petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit. The petitions should be denied because they present issues already before this Court. As conceded by the Secretary of the Interior, the legal issues presented by this case are currently under consideration in *Hodel v. Village of Gambell*, No. 85-1406 and *Amoco Production Co. v. Village of Gambell*, No. 85-

1239. By agreement of the parties, all proceedings in this case are stayed in the district court pending this Court's disposition of the issues presented in *Gambell*. Since further proceedings in this case will be governed by this Court's forthcoming decision in *Gambell*, no purpose would be served by granting certiorari here.

STATEMENT OF THE CASE

This case concerns Secretary Hodel's decision to hold Outer Continental Shelf Lease Sale 92. In early December, 1985, Secretary Hodel announced his intention to offer 990 oil and gas leases to 5.6 million acres of the OCS lying under the waters of the geologic formation known as the North Aleutian Basin. The lease sale area is located between 11 and 114 miles off the southwestern coast of Alaska in the waters of Bristol Bay.[1]

The lease sale presents substantial threats to the environment, the subsistence hunting and fishing economy which depends upon that environment, and the commercial fisheries which support a substantial portion of Alaska's population. Bristol Bay is one of the richest and most valuable marine areas in the world.[2] Its importance to subsistence hunting and fish-

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[1] *See* U.S. Department of Interior, Minerals Management Service, SECRETARIAL ISSUE DOCUMENT, SALE 92, NORTH ALEUTIAN BASIN (August 1985) (SID) (CR. 3, Ex. 1, p. 1); FINAL NOTICE OF SALE, 50 Fed. Reg. 51,372 (Dec. 16, 1985).

[2] U.S. Department of the Interior, FINAL ENVIRONMENTAL IMPACT STATEMENT, NORTH ALEUTIAN BASIN, SALE 92, September 1985 (FEIS) at III-C-1 (The fisheries of Bristol Bay are among the most productive in the world); National Marine Fisheries Service (NMFS) COMMENTS ON THE PROPOSED NOTICE OF

ing is unparalleled. The marine and coastal areas of the region support a broad spectrum of migratory fish, birds and marine mammals, all of which are critical subsistence resources for rural villages throughout western Alaska. FEIS at Table III-36. Approximately 88% of all five species of Pacific salmon entering the streams bordering the Bering Sea migrate through the waters of Bristol Bay, spending significant and critical periods of their development in the sale area. FEIS at III-B-1. At least 20 species of marine mammals frequent the sale area, and thousands of waterfowl migrate and feed in the Bristol Bay area each year. *See generally* FEIS at Chapter III.

The Bristol Bay lease sale threatens this fish and wildlife. Interior indicates there is a 52-57% chance of one or more oil spills of 1,000 barrels or more occurring if oil and gas reserves are found in the lease sale area. U.S. Department of the Interior, ENVIRONMENTAL ASSESSMENT, LEASE SALE 92 (September 1985) at 5, Ex. 6 to *Secretary's Oppo. Memo.* (CR. 14). There is also the possibility of a catastrophic spill. Interior acknowledges that activities associated with the development and production of oil and gas reserves in Bristol Bay could be expected to directly reduce subsistence harvests by killing some percentage of the fish and wildlife taken for subsistence purposes. *See generally* FEIS at Chapter IV. It further predicts that oil spills could affect the social and cultural systems of some rural villages by disturbing

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SALE at 1, *State of Alaska Mot. for Prelim. Inj.*, Ex. 8-A (CR. 2, J85-037) (Bristol Bay is the single most important region of the United States OCS for marine mammals and commercial fisheries).

subsistence-use patterns. FEIS at IV-B-139-141, 144. Should an oil spill cause the closure of the Bristol Bay commercial salmon fisheries for fear of producing a tainted product, the closure could cause a "shortage of cash income which would result in unmet subsistence needs, thereby causing a burden to family - or institutional - support networks." FEIS at IV-B-144. Alterations in subsistence patterns could cause outmigration and a breakdown in family relationships and kinship structures. FEIS at IV-B-144-45.

The plaintiffs in this action brought suit because they judged that Interior had inadequately considered and improperly weighed the impacts associated with the Bristol Bay Lease Sale. The plaintiffs, here the respondents, represent twenty five different parties, each with different interests in and objections to the Bristol Bay sale. They include: the State of Alaska and other political subdivisions; tribal entities including three villages in western and southwestern Alaska, an intertribal organization representing 56 villages in the Yukon River Delta, and the Eskimo Walrus Commission; various organizations representing commercial fishing interests; and a coalition of environmental organizations, including Trustees for Alaska and the Natural Resources Defense Council, Inc.[3]

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[3] Respondents are collectively referred to as the "villages." They include the Tribal Village of Akutan; the Tribal Village of Togiak; the Tribal Village of Nelson Lagoon; Governor Bill Sheffield; the State of Alaska; Alaska Independent Fishermen's Marketing Association; Aleutians East Coastal Resource Service Area; Bering Sea Fishermen's Association; Bristol Bay Borough; Bristol Bay Coastal Resources Service Area; Cenaliutritt; United Fishermen of Alaska; Trustees for Alaska; Natural Resources Defense Council, Inc.; Eskimo Walrus Commission; Northern

In three separate lawsuits filed in late December, 1985, the villages sought to enjoin the Bristol Bay Lease Sale. Though the suits raised a number of challenges to the sale -- based, *inter alia*, on the National Environmental Policy Act, the Outer Continental Shelf Lands Act and the Endangered Species Act -- the only issue presented to this Court at this time relates to Section 810 of Title VIII of the Alaska National Interest Lands Conservation Act.[4] Title VIII of the Conservation Act implements systematic and comprehensive protections for subsistence hunting and fishing rights in Alaska. Section 810 of that title insures that leasing federal lands will not unreasonably compromise those rights. It requires federal officials to carefully evaluate the impact of leasing on subsistence uses and resources and to identify alternative land selections before making any leasing decisions. 16 U.S.C. § 3120(a). For leasing that might significantly restrict subsistence uses, the land manager, before issuing any leases, must give notice, hold hearings,

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Alaska Environmental Center; City of Quinhagak; Nunam Kitlutsisti; Alaska Center for the Environment; Village of False Pass; Sierra Club; the Wilderness Society; Environmental Policy Institute; National Audubon Society; and Defenders of Wildlife.

[4] Act of Dec. 2, 1980, Title VIII, Pub. L. No. 96-487, 94 Stat. 2371, *codified at* 16 U.S.C. § 3101 *et seq.* Each of the three lawsuits alleged violations of Section 810 of the Conservation Act. The State of Alaska and Trustees for Alaska also alleged violations of Section 102(2)(C) of the National Environmental Policy Act (NEPA), 42 U.S.C. § 4332(2)(C); Sections 7 and 9 of the Endangered Species Act (ESA), 16 U.S.C. §§ 1536, 1538; and Section 19 of the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. § 1345. The district court found it unnecessary to reach these claims once it found sufficient grounds for issuance of the preliminary injunction because of the Secretary's violation of Section 810 of the Conservation Act.

and insure that: (1) the restriction is necessary; (2) the leasing involves the minimal amount of public lands; and (3) reasonable steps will be taken to minimize adverse impacts on subsistence uses and resources. 16 U.S.C. § 3120(a)(1)-(3).

The villages claim that Interior violated this statute when preparing for OCS Sale 92. Chief among these violations are: (1) the Secretary's failure to comply with the mandates of the first sentence of Section 810(a) which require that he study and evaluate the effect of his leasing decision on subsistence uses on a village basis; (2) the Secretary's failure to apply the applicable legal standard announced by the court of appeals in two previous cases in determining whether leasing "would significantly restrict subsistence uses and resources;" and (3) the Secretary's failure to find, even under his inappropriate "would in fact" standard, that Lease Sale 92 "would significantly restrict" subsistence uses.

The district court found that the villages would probably prevail on their claim that the Secretary had used the wrong legal standard when applying the Conservation Act to OCS Lease Sale 92. *Memo. and Order* at 4, CR. 37 (Fed. Pet App. 13a). Because the Secretary could not unequivocally conclude that the leasing "would in fact" restrict subsistence uses, he determined that he need not comply with Section 810(a)(1)-(3) of the Conservation Act. The district court found that the Secretary applied the wrong legal standard in reaching this conclusion. *Id.* Relying on *Village of Gambell v. Hodel*, 774 F.2d 1414, 1421-22 (9th Cir. 1985), *cert. granted*, 106 S. Ct. 2274 (1986) and *Kunaknana v. Clark*, 742 F.2d 1145, 1151 (9th Cir. 1984), it concluded that the Secretary must com-

ply with Section 810(a)(1)-(3) of the Conservation Act whenever there are "substantial questions" as to whether leasing would significantly restrict subsistence uses. *Id.* (Fed. Pet. App. 10a-11a).[5]

The district court further found that the Secretary's decision not to comply with the pertinent sections of the Conservation Act was arbitrary and capricious even assuming that his "would in fact" standard was the appropriate test. *Memo. and Order* at 3, CR. 37 (Fed Pet. App. 11a-12a). Although Interior had conceded in studies prepared pursuant to the NEPA that "[d]irect effects on subsistence-use patterns in specific communities could be realized," FEIS at IV-B-138, it nevertheless found in its Section 810 analysis that none of the 990 leases to 5.6 million acres of OCS lands underlying Bristol Bay was likely to signifi-

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[5] In determining when the Secretary must comply with the provisions of Section 810(a)(1)-(3), the district court noted the appropriateness of applying the "substantial questions" standard adopted by the court of appeals for determining when the Secretary must prepare an EIS under the NEPA. *Memo. and Order* at 3, n. 1, CR. 37 (Fed. Pet. App. 11a). The NEPA requires that an EIS be prepared for all major federal actions "significantly affecting" the quality of the human environment. 42 U.S.C. § 4332(2)(C). The courts of appeals have rejected arguments that the phrase "actions significantly affecting" means only those actions which "will in fact" significantly affect the human environment. They have held that when substantial questions are raised as to whether a project will have this effect, the agency must prepare an EIS. *E.g., Quinonez-Lopez v. Coco Lagoon Development Corp.*, 733 F.2d 1, 2 (1st Cir. 1984); *Save Our Ten Acres v. Kreger*, 472 F.2d 463, 467 (5th Cir. 1973); *Minnesota Public Interest Research Group v. Butz*, 498 F.2d 1314, 1320 (8th Cir. 1974); *Foundation for North American Wild Sheep v. United States Dept. of Agriculture*, 681 F.2d 1172, 1177-78 (9th Cir. 1982).

cantly restrict subsistence uses. FEIS at IV-K-9-10. Noting that "it is unclear on what basis the Secretary determined (beyond his oil spill risk analysis) that subsistence effects were unlikely," the district court found that the administrative record did not support the Secretary's conclusion that the lease sale was "unlikely" to affect subsistence activities. *Memo. and Order* at 3, CR. 37 (Fed. Pet. App. 12a).

On the basis of its holding that the Secretary used the wrong legal standard when applying the Conservation Act to OCS Sale 92, the district court issued a preliminary injunction on January 13, 1986. Its original order enjoined the Secretary from receiving, opening or accepting any bids. *Prelim. Inj.*, CR. 38 (Fed. Pet. App. 15a). At the request of the oil companies, the district court later modified its order to allow Interior to accept sealed bids, but required that the bids be held unopened and under seal until further order of the court. The court also tolled the time set by law for both the return of unopened bids and the withdrawal of bids by the oil companies. *Partial Stay of Prelim. Inj.*, CR. 43 (Fed. Pet. App. 16a-17a).

The Secretary and the oil companies took an expedited appeal. The sole issue raised on appeal was whether Interior had applied the correct standard in making the "significant restriction" determination required to trigger compliance at the lease sale stage with the notice, hearings and findings mandated by Section 810(a)(1)-(3). On April 28, 1986, the court of appeals affirmed the district court's order enjoining Lease Sale 92. *Tribal Village of Akutan v. Hodel*, 792 F.2d 1376 (9th Cir. 1986) (Fed. Pet. App. 1a). Rejecting the argument that significant restrictions must be "likely" in order to trigger full compliance at the

lease sale stage with the mandates of Section 810(a)(1)-(3), it found that the Secretary applied the wrong standard when deciding not to comply with Section 810(a) of the Conservation Act. 792 F.2d at 1378-79. Its conclusion in this regard rested solely on its previous decisions in *Village of Gambell v. Hodel*, 774 F.2d 1414 (1985), *cert. granted*, 106 S. Ct. 2274 (1986) and *Kunaknana v. Clark*, 742 F.2d 1145 (9th Cir. 1984). 792 F.2d at 1379 (Fed. Pet. App. 5a-7a).

Following the court of appeals' decision, the parties agreed to a stay of all proceedings in the district court pending this Court's disposition of the issues raised in *Hodel v. Village of Gambell*, No. 85-1406 and *Amoco Production Co. v. Village of Gambell*, No. 85-1239. Pursuant to this stipulation, the district court stayed all proceedings pending this Court's resolution of the issues presented in *Gambell*. (Fed. Pet. App. 18a-19a).

REASONS FOR NOT GRANTING THE WRIT

A. REVIEW OF THE INTERLOCUTORY ORDER OF THE LOWER COURT IN THIS CASE IS UNNECESSARY AND UNWARRANTED.

The Secretary and the oil companies assert that this case presents the issues of: (1) whether Section 810 of the Conservation Act applies to the OCS; (2) whether an injunction is the appropriate remedy for a violation of Section 810; and (3) whether Section 810 -- which directs that "[n]o . . . lease . . . which would significantly restrict subsistence uses shall be effected . . ." -- applies to leasing when significant restrictions are possible at the development and production stage.

These issues do not warrant the grant of certiorari, either individually or collectively. The first two issues

are not even properly presented to this Court.[6] Moreover, all parties agree that all three issues are currently pending before this Court in *Village of Gambell v. Hodel*, 774 F.2d 1414 (9th Cir. 1985), *cert. granted, Amoco Production Co. v. Village of Gambell*, and *Hodel v. Village of Gambell*, 106 S. Ct. 2274 (1986). Nevertheless, the Secretary and the oil companies request that this Court grant certiorari on the same issues here. The Secretary requests that this Court hold his petition for a writ of certiorari and dispose of it as appropriate in light of this Court's decision in *Gambell*. Under the Secretary's proposal, this Court would hold the petitions, decide *Gambell*, and then either deny certiorari or grant certiorari and summarily remand the matter to the court of appeals. On remand, the court of appeals would presumably remand the matter to the district court for further proceedings consistent with this Court's *Gambell* decision.

This process would only waste the time of this Court and the parties participating in this lawsuit. This case involves an interlocutory appeal, the resolution of which depends on this Court's disposition of issues already before it in *Gambell*. In recognition of this fact, the parties to this action agreed to stay all proceedings in the district court pending this Court's decision in *Gambell*. On May 21, 1986, pursuant to a

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[6] Neither the Secretary nor the oil companies raised these issues in the court of appeals. This Court has repeatedly held that "[w]hen the issues are neither raised before nor considered by the court of appeals, this Court will not ordinarily consider them." *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 146 n. 2 (1970). *Accord, e.g., Youngberg v. Romero*, 457 U.S. 307, 316 n. 19 (1982); *Lawn v. United States*, 355 U.S. 339, 362 n. 16 (1958); *Husty v. United States*, 282 U.S. 694 (1931).

joint motion of the parties, the district court entered its stay order. Under the district court's order, the Secretary was allowed to continue to hold, unopened and under seal, the bids he received for Lease Sale 92 tracts. All other proceedings, including those on a host of issues unconnected with Section 810, are stayed pending the resolution of the issues raised in *Gambell*. *Stay Order* (Fed. Pet. App. 18a-19a).

Since the issues presented by this case will be decided in *Gambell*, and since this case is stayed in the district court pending that decision, no reason exists for granting certiorari to review the court of appeals' decision in this case. The district court will automatically review the appropriateness of its preliminary injunction in light of this Court's decision in *Gambell*, and no harm will accrue to the Secretary or the oil companies pending that decision. In the event this Court modifies the court of appeals' decision in *Gambell*, the district court will be obligated to modify its order in this case, and if necessary dissolve the preliminary injunction if the villages are unable to establish the basis for an injunction on other grounds.[7]

B. THIS CASE DOES NOT PRESENT AN IMPORTANT ISSUE NOT ALREADY BEFORE THE COURT IN *GAMBELL*.

Although the Secretary concedes that "[t]he basic issue of statutory construction is already before the Court in *Village of Gambell*" (Fed. Pet. 8), the oil

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[7] In granting the preliminary injunction, the district court stated that if it becomes necessary to address the villages' remaining claims on a preliminary injunction basis, "plaintiffs may file renewed motions for [a] preliminary injunction." *Memo. and Order* at 4, CR. 37 (Fed. Pet. App. 12a).

companies assert that even if this Court affirms *Gambell*, this case presents an additional important issue. They claim that the issue presented here, but not in *Gambell*, is whether Section 810(a)(1)-(3) applies to a disposition of federal lands "when under any reasonable hypothesis it is unlikely to restrict subsistence [uses]." (Amoco Pet. 8, n. 10).

This case does not present an important issue not already before this Court in *Gambell*. The court of appeals addressed this question directly, unambiguously finding that the issues in the two cases were identical for purposes of Section 810 of the Conservation Act. The court of appeals reviewed the findings made by Interior in *Gambell* and compared them to the findings made in this case. Expressly holding that the findings in the two cases were substantially the same, it stated:

> The *Gambell II* court rejected the Secretary's view that section 810(a)(1)-(3) procedures required a *likelihood* of significant subsistence restrictions, and, *on findings not meaningfully different than those here*, concluded that the Secretary was required to comply with the notice and hearing requirements of the statute. We believe that *Gambell II* governs this case, and that the district court did not err in determining that appellants had shown a strong likelihood of success on the merits of their claim that the Secretary had failed to comply with the notice and hearing requirements of section 810(a)(1)-(3).

792 F.2d at 1379 (Fed. Pet. App. 6a-7a) (first emphasis in original, second emphasis added).

Moreover, the assertion that OCS Lease Sale 92 is "unlikely" to significantly restrict subsistence uses under any reasonable hypothesis is unequivocally repudiated by the record in this case, as well as by the district court's reading of that record. After combing the record, the district court specifically noted that the record contained no evidence which could justify the Secretary's finding that the Bristol Bay sale was "unlikely" to significantly restrict subsistence uses. *Memo. and Order* at 3, CR. 37 (Fed. Pet. App. 12a).

The conclusion of the district court is fully supported by the record. That record reveals that the Secretary had no basis for claiming that the Bristol Bay sale was "unlikely" to significantly restrict subsistence uses. Lease Sale 92 offered 5.6 million acres of the OCS for oil and gas leasing. ENVIRONMENTAL ASSESSMENT at 2. Some of the tracts are located within 11 miles of the shore. *Id.* The Secretary, in studies prepared pursuant to the NEPA, estimated a 52-57% chance of an oil spill of 1,000 barrels during the production stage and predicted a 21% chance of discovering commercial quantities of oil and gas. *Id.* at 5. The probability of an oil spill contacting biological resources in the Port Moller and Nelson Lagoon area ranged between 13-21%, depending upon the time-frame considered. ENVIRONMENTAL ASSESSMENT at Table 4. The Secretary further predicted that an oil spill would have major effects on red king crab, major to moderate effects on marine and coastal birds, and moderate effects on fur seals. FEIS at Table II-2, Table S-1. The Secretary also concluded, in his NEPA analysis, that "[d]irect effects on subsistence-use patterns in specific communities could be realized." FEIS at IV-B-138. *See also* FEIS at IV-B-140.

Yet in his "Section 810 Analysis," the Secretary ignored the direct effects the lease sale could have on the subsistence uses of specific villages and omitted from consideration the possible effects of an oil spill on the region's fish and wildlife populations which support those uses. FEIS at IV-K-1-10 (Amoco Pet. App. 21a-37a). Although the Secretary reached the conclusion that the Bristol Bay sale could significantly affect the fish and wildlife of the region, he found that the sale would not significantly affect subsistence uses which are totally dependent upon that fish and wildlife. This arbitrary inconsistency led the district court to conclude that the record could not, as a factual matter, support the Secretary's finding that the lease sale was "unlikely" to restrict subsistence uses.

CONCLUSION

The petitions for certiorari should be denied. This Court has already granted review of the only legal issue presented for review by this case. Since this case involves an interlocutory appeal, and since all proceedings below have been stayed, granting the petitions would only waste the time of this Court and the parties.

Respectfully submitted,

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